Samsung C&T Corp UEM Construction JV Sdn Bhd v Eversendai Constructions (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24C-15–02 OF 2023
ALIZA SULAIMAN JC
31 OCTOBER 2023

Civil Procedure — Stay of proceedings — Application of — Plaintiff applied to stay adjudication decision and all proceedings pending final determination by way of arbitration — Whether there was delay in filing of stay application and if so, whether this amounted to abuse of court's process — Whether there were clear and unequivocal errors in adjudication decision — Whether defendant's financial position was such that it would be unable to repay adjudicated sum to plaintiff in event plaintiff succeeded in arbitration proceedings

This was an application by the plaintiff to stay the adjudication decision ('AD') by the learned adjudicator and all execution proceedings, winding up proceedings, request for direct payment or suspension/reduction in the rate of progress of the subcontract works pending final determination by way of arbitration ('the stay application'). The adjudicator determined, among others, that the plaintiff shall pay the defendant the sum of RM25,457,990.03 with interest. The defendant filed an application pursuant to s 28 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') ('the enforcement application') and the plaintiff then filed its setting aside application under s 15 of the CIPAA ('setting aside application'). The defendant also applied to restrain the plaintiff from receiving the sum under a bank guarantee until final disposal of all disputes between the parties ('the injunction application'). The plaintiff's setting aside application was dismissed while the defendant's injunction application and enforcement application were allowed. The plaintiff's grounds in support of the stay application were: (a) there were clear and manifest errors in the AD; and (b) in the event the adjudication sum was paid to the defendant and the plaintiff succeeded in the stay application, it would be difficult to recover the adjudication sum from the defendant given that the defendant was facing financial difficulties. The issues for consideration were: (i) whether there was delay in the filing of the stay application and if so, whether this amounted to an abuse of the court's process; (ii) whether there were clear and unequivocal errors in the AD; and (iii) whether the defendant's financial position was such that it would be unable to repay the adjudicated sum to the plaintiff in the event the plaintiff succeeded in the arbitration proceedings.

Held, allowing the application with no order as to cost:

(1) Any allegations of mala fide intention on the part of the plaintiff to delay matters were unfounded. Moreover, an ad interim stay of the AD was granted in the setting aside application. Even assuming there was delay in filing the stay application, that alone could not justify a dismissal of the stay application in limine as the CIPAA did not provide a timeline within which an application to stay an adjudication decision must be filed (see paras 12–13 & 15).

(2) The purported errors in the AD were essentially a repetition of the grounds raised by the plaintiff in the setting aside application (see para 17).

(3) The plaintiff had established the defendant's inability to repay the adjudicated sum to the plaintiff, if required to do so after the arbitration. The plaintiff's expert ie Lim Chee Teong ('CT Lim') had the requisite peculiar skills and knowledge in analysing the defendant's audited financial statements and the defendant's experts' report ('PKF report'). CT Lim qualified as an expert and there was no justification to reject his evidence as being inadmissible or to give lesser weight to his report ('PwC report'). From the PwC report, there was uncertainty over the defendant's ability to carry on as a going concern. The plaintiff had proven, on a balance of probabilities, the precarious financial position of the defendant and it was not a certainty that the adjudicated sum would be re-paid to the plaintiff should the outcome of the arbitration be in the plaintiff's favour such that a conditional stay was appropriate in the interest of justice. Moreover, the PKF report did not consider the defendant's financial status and the key question on the defendant's ability to repay the adjudicated sum to the plaintiff. Lastly, the PwC report casted doubt on the defendant's assertions on 'support' as it was unlikely the defendant would obtain financial assistance from its holding company, and the substantial amounts owed to related companies, a holding company and a director was in fact indicative of the defendant not being in a position to repay the adjudicated sum. The justice of the case warranted a stay of the AD pending final determination by way of arbitration as there was a real risk that the adjudicated sum, if released to the defendant, would not be able to be re-paid to the plaintiff in the event the plaintiff finally succeeded in the arbitration proceedings (see paras 22 & 25).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif untuk menangguhkan keputusan adjudikasi ('AD') oleh adjudikator yang bijaksana dan semua prosiding pelaksanaan, prosiding penggulungan, permintaan bayaran terus atau penggantungan/pengurangan dalam kadar kemajuan kerja subkontrak sementara menunggu penentuan muktamad dengan cara timbang tara ('permohonan penangguhan'). Adjudikator memutuskan, antara lain, bahawa

A plaintif hendaklah membayar defendan sejumlah RM25,457,990.03 dengan faedah. Defendan memfailkan permohonan menurut s 28 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') ('permohonan penguatkuasaan') dan plaintif kemudian memfailkan permohonan mengenepikannya di bawah s 15 APAIP ('permohonan mengenepikan'). B Defendan juga memohon untuk menghalang plaintif daripada menerima jumlah wang di bawah jaminan bank sehingga pelupusan muktamad semua pertikaian antara pihak ('permohonan injunksi'). Permohonan mengenepikan plaintif telah ditolak manakala permohonan injunksi dan permohonan penguatkuasaan defendan dibenarkan. Alasan plaintif untuk menyokong C permohonan penangguhan adalah: (a) terdapat kesilapan yang jelas dan nyata dalam AD; dan (b) sekiranya jumlah adjudikasi telah dibayar kepada defendan dan plaintif berjaya dalam permohonan penangguhan, adalah sukar untuk mendapatkan semula jumlah adjudikasi daripada defendan memandangkan D defendan menghadapi masalah kewangan. Isu untuk pertimbangan adalah: (i) sama ada terdapat kelewatan dalam memfailkan permohonan penangguhan dan jika ya, sama ada ini merupakan penyalahgunaan proses mahkamah; (ii) sama ada terdapat kesilapan yang jelas dan tidak berbelah bahagi dalam AD; dan (iii) sama ada kedudukan kewangan defendan adalah sedemikian rupa E sehingga ia tidak dapat membayar balik jumlah adjudikasi kepada plaintif sekiranya plaintif berjaya dalam prosiding timbang tara.

Diputuskan, membenarkan permohonan tanpa perintah kos:

F (1) Sebarang dakwaan niat mala fide di pihak plaintif untuk menangguhkan perkara adalah tidak berasas. Selain itu, penangguhan interim AD telah diberikan dalam permohonan mengenepikan. Walaupun dengan mengandaikan terdapat kelewatan dalam memfailkan permohonan penangguhan, itu sahaja tidak boleh mewajarkan penolakan permohonan penangguhan in limine kerana APAIP tidak menyediakan G garis masa di mana permohonan untuk menangguhkan keputusan adjudikasi mesti difailkan (lihat perenggan 12–13 & 15).

(2) Kesilapan yang dikatakan dalam AD pada dasarnya adalah pengulangan alasan yang dibangkitkan oleh plaintif dalam permohonan H mengenepikan (lihat perenggan 17).

(3) Plaintif telah membuktikan ketidakupayaan defendan untuk membayar balik jumlah adjudikasi kepada plaintif, jika dikehendaki berbuat demikian selepas timbang tara. Pakar plaintif iaitu Lim Chee Teong ('CT Lim') mempunyai kemahiran dan pengetahuan khusus yang diperlukan I dalam menganalisis penyata kewangan teraudit defendan dan laporan pakar defendan ('laporan PKF'). CT Lim layak sebagai pakar dan tidak ada justifikasi untuk menolak keterangannya sebagai tidak boleh diterima atau memberi pertimbangan yang lebih kecil kepada laporannya ('laporan PwC'). Daripada laporan PwC, terdapat

ketidakpastian terhadap keupayaan defendan untuk meneruskan sebagai usaha berterusan. Plaintif telah membuktikan, berdasarkan imbangan kebarangkalian, kedudukan kewangan defendan yang tidak menentu dan ia bukanlah satu kepastian bahawa jumlah adjudikasi akan dibayar semula kepada plaintif sekiranya keputusan timbang tara memihak kepada plaintif oleh itu penangguhan bersyarat adalah sesuai demi kepentingan keadilan. Selain itu, laporan PKF tidak mengambil kira status kewangan defendan dan persoalan utama mengenai keupayaan defendan untuk membayar balik jumlah adjudikasi kepada plaintif. Akhir sekali, laporan PwC menimbulkan keraguan terhadap dakwaan defendan mengenai 'sokongan' kerana tidak mungkin defendan akan mendapatkan bantuan kewangan daripada syarikat induknya, dan jumlah yang banyak terhutang kepada syarikat berkaitan, syarikat induk dan pengarah sebenarnya menunjukkan defendan tidak berada dalam kedudukan untuk membayar balik jumlah adjudikasi. Keadilan kes mewajarkan penangguhan AD sementara menunggu penentuan muktamad melalui timbang tara kerana terdapat risiko nyata bahawa jumlah adjudikasi, jika diserahkan kepada defendan, tidak akan dapat dibayar semula kepada plaintif sekiranya plaintif akhirnya berjaya dalam prosiding timbang tara (lihat perenggan 22 & 25).]

Cases referred to

ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd and other appeals [2023] 4 MLJ 720; [2023] 1 CLJ 1, CA (refd)

CRCC Malaysia Bhd v M101 Entity Sdn Bhd and other cases [2021] MLJU 1305, HC (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)

Eversendai Constructions (M) Sdn Bhd v Samsung C&T Corporation UEM Construction JV Sdn Bhd [2023] MLJU 2025, HC (refd)

Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor [1986] 2 MLJ 198, SC (distd)

Hisham bin Halim v Maya bt Ahmad Fuaad & Ors [2021] MLJU 2293, HC (distd)

IRDK Venture Sdn Bhd v Econpile (M) Sdn Bhd and another appeal [2020] MLJU 939, CA (refd)

JEKS Engineering Sdn Bhd v PALI PTP Sdn Bhd and another case [2022] 9 MLJ 541, HC (refd)

Kayangan Kemas Sdn Bhd v Tmt Solutions Sdn Bhd [2019] MLJU 1277, HC (refd)

MRCB Builders Sdn Bhd v Pembinaan Mitrajaya Sdn Bhd and another case [2023] MLJU 52, HC (refd)

Majuikan Sdn Bhd v Barclays Bank Plc [2015] 1 MLJ 171; [2014] 9 CLJ 337, CA (refd)

Meridian Contracts Sdn Bhd v Bauer (Malaysia) Sdn Bhd and another summons [2020] MLJU 1405, HC (refd)

Pinnacle Supreme Sdn Bhd v DSG Projects Malaysia Sdn Bhd [2021] MLJU 961; [2021] 1 LNS 852, HC (refd)
RA Suria Sdn Bhd v Cedy Third Contracting and Trading (M) Sdn Bhd and other cases [2023] MLJU 247, HC (refd)
Sime Darby Energy Solution Sdn Bhd (formerly known as Sime Darby Offshore Engineering Sdn Bhd) v RZH Setia Jaya Sdn Bhd [2022] 1 MLJ 458, CA (refd)
Syarikat TD Sdn Bhd v JEKS Engineering Sdn Bhd and another case [2019] MLJU 1754, HC (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22, FC (refd)
Zeta Letrik Sdn Bhd v JAKS Sdn Bhd and other cases [2022] MLJU 2734, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 15, 16, 16(1)(b), 28, 29, 30
Rules of Court 2012 O 69A r 4, O 92 r 4

Kuhendran Thanapalasingam (with Daniel Lau Hsien Yuong and Agesh Krishendra Jeyaratnam) (Zul Rafique & Partners) for the plaintiff.
James Monteiro (with Vishal V Kumar and Ban Qiao Hui) (James Monteiro) for the defendant.

Aliza Sulaiman JC:

INTRODUCTION

[1] This is an application by the plaintiff pursuant to para 16(1)(b) of the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('the CIPAA'), O 69A r 4 of the Rules of Court 2012 ('the RC 2012') and/or the inherent jurisdiction of the court under O 92 r 4 of the RC 2012 to stay the adjudication decision dated 18 August 2022 ('AD') by the learned adjudicator, Mr Ivan Loo Yew Fook, and all execution proceedings, winding up proceedings, request for direct payment under s 30 of the CIPAA or cl 20.8 of the Particular Conditions of the Main Contract between the plaintiff and PNB Merdeka Ventures Sdn Bhd dated 28 March 2017 or suspension/reduction in the rate of progress of the subcontract works pursuant to s 29 of the CIPAA pending final determination by way of arbitration ('stay application').

[2] After having considered the cause papers and submissions by the parties, I had on 7 September 2023, allowed a conditional stay of the AD pending final determination of the dispute between the parties by way of arbitration. The adjudicated sum, which has been held by the defendant's

solicitors since 3 May 2023, shall continue to be so held in their stakeholders account until the disposal of the arbitration proceedings. No order was made as to cost.

[3] The defendant, being aggrieved with the aforesaid decision, has since appealed against the same and applied for an early hearing date at the Court of Appeal. The full grounds for the decision are set out in the succeeding part of this judgment.

THE CAUSE PAPERS

[4] The cause papers for the stay application are as follows:

(a) the plaintiff's originating summons ('OS') dated 10 February 2023 (encl 1);

(b) the plaintiff's affidavit in support ('AIS') affirmed by its Deputy Project Director, Wan Nor Azman bin Wan Salleh on 10 February 2023 (encls 2–4);

(c) the plaintiff's supplementary affidavit affirmed by the same deponent on 2 March 2023 (encls 7–18);

(d) the defendant's affidavit in reply ('AIR') affirmed by its Director, Nathan a/l Elumalay on 8 March 2023 (encl 19);

(e) the plaintiff's AIR affirmed by the same deponent on 29 March 2023 (encls 21–22);

(f) the defendant's notice of intention to use affidavit dated 3 May 2023 (encl 25);

(g) the plaintiff's supplemental affidavit (2) affirmed by the same deponent on 10 May 2023 (encl 31);

(h) the defendant's AIR (2) affirmed by the same deponent on 2 June 2023 (encl 39);

(i) the plaintiff's expert affidavit affirmed by the Director of PricewaterhouseCoopers Advisory Services Sdn Bhd ('PwC'), Lim Chee Teong ('CT Lim') on 3 July 2023 (encls 41–43);

(j) the plaintiff's AIR (2) affirmed by its Project Manager, Sunggyeom Kim on 3 July 2023 (encls 44–46);

(k) the defendant's AIR (3) affirmed by the same deponent on 14 July 2023 (encl 47); and

(l) the plaintiff's AIR (3) affirmed by Wan Nor Azman on 9 August 2023 (encl 49).

A BRIEF FACTS

[5] The background facts of this case have been outlined in *Eversendai Constructions (M) Sdn Bhd v Samsung C&T Corporation UEM Construction JV Sdn Bhd* [2023] MLJU 2025, which is the judgment of this court in OS No WA-24C-156–08 of 2022 in allowing the defendant's application to restrain the plaintiff from receiving the sum under a bank guarantee until final disposal of all disputes between the parties ('injunction application').

[6] The salient background facts will not be repeated here and suffice for present purposes to state that:

(a) on 18 August 2022, the adjudicator determined, among others, that the plaintiff shall pay the defendant the sum of RM25,457,990.03 with simple interest at a rate of 6.4%pa on the said sum from 1 March 2022 until full payment;

(b) the defendant filed an application pursuant to s 28 of the CIPAA on 25 August 2022 (OS No WA-24C-163–08 of 2022; 'enforcement application') and the plaintiff then filed its application under s 15 of the CIPAA on 8 September 2022 (OS No WA-24C-174–09 of 2022; 'setting aside application');

(c) the defendant issued a notice of arbitration on 11 November 2022;

(d) the setting aside application and the enforcement application were heard together, with the agreement of the parties, on 13 February 2023 and 9 March 2023. The hearing of the injunction application took place on 7 and 14 April 2023. The decision for all three applications was pronounced on 20 April 2023 whereby the setting aside application was dismissed, and the enforcement application and the injunction application were allowed;

(e) the plaintiff did not appeal against the decision of this court for the setting aside application and the enforcement application. The broad grounds of decision in relation to both applications are set out in *Eversendai Constructions* (at para 35); and

(f) the stay application was heard on 21 August 2023.

THE STAY APPLICATION

[7] The plaintiff's grounds in support of the stay application as stated in the OS are as follows:

(a) there are clear and manifest errors in the AD; and

(b) in the event the adjudication sum is paid to the defendant and the plaintiff succeeds in the stay application, it will be difficult to recover the adjudication sum from the defendant given that the defendant is facing financial difficulties.

[8] The plaintiff argued that at the outset, the plaintiff has met the threshold requirement for a stay pursuant to para 16(1)(b) of the CIPAA, as this matter is pending final determination via arbitration which has commenced. To support this position, counsel for the plaintiff cited the judgment in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 (FC) which held, among others at paras 82 and 84, that:

(a) s 16 of the CIPAA allows some degree of flexibility to stay an adjudication decision where there are clear and unequivocal errors, or to meet the justice of the individual case; and

(b) the correct approach under s 16 of the CIPAA is to evaluate each case on its merits where the financial capacity of the party concerned to repay the adjudicated sum could be a factor in determining the outcome of the application.

ANALYSIS AND DECISION OF THE COURT

First issue: Whether there is delay in the filing of the stay application and if so, whether this amounts to an abuse of the court's process

[9] The defendant complained that there is undue delay in the filing of the stay application as the plaintiff had filed the same three months after the issuance of the notice of arbitration (reference was made to rules 5.1 and 7.5 of the Asian International Arbitration Centre Arbitration ('AIAC') Rules 2021) and one working day before the hearing of the setting aside application and the enforcement application.

[10] The defendant alleged that the plaintiff's conduct amounts to an abuse of the court's process as the plaintiff wanted to ensure that the stay application will not be disposed together with the enforcement application and the setting aside application, and to enable the plaintiff to obtain, upon dismissal of the setting aside application, an interim stay pending the disposal of the stay application.

[11] The plaintiff denied the defendant's allegation of delay (see para 6, encl 21) on the grounds that:

(a) the defendant had deliberately excluded the AD from the notice of arbitration and hence, the plaintiff had to include the AD in its response

A to the notice of arbitration which was submitted on 11 January 2023 (see exhs 'WNA12' and 'WNA13', encl 4); and

(b) the defendant had only submitted the Registration Request to the AIAC to register the arbitration on 3 February 2023 (see exh 'WNA14', encl 4).

B

[12] Having considered the parties' averments and submissions on the issue of delay, I was inclined to agree with the plaintiff that any allegations of mala fide intention on the part of the plaintiff to delay matters are unfounded.

C

[13] Moreover, on 14 September 2022, Lim Chong Fong J (now JCA) had granted an ad interim stay of the AD in terms of prayer 1 in encl 4 of the setting aside application until 27 September 2022 or such further order. After having heard the parties on 27 September 2022, His Lordship then granted a D conditional stay of the AD in terms of the same prayer by ordering the plaintiff to pay the principal adjudicated sum amounting to RM25,457,990.03 into an interest-bearing account held by Messrs Zul Rafique & Partners until the disposal of encl 1 or further order within 14 days from the date of the order. The plaintiff's oral application for a stay against the condition pending appeal E was disallowed. The condition was subsequently fulfilled within the stipulated time and the plaintiff's appeal, which was filed on 17 October 2022, was withdrawn on 2 June 2023.

[14] In addition, the case authorities relied upon by the defendant, namely, F *Haji Wan Habib Syed Mahmud v Datuk Patinggi Haji Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198 and *Hisham bin Halim v Maya bt Ahmad Fuaad & Ors* [2021] MLJU 2293 can be distinguished on the facts as both cases do not concern an application pursuant to s 16 of the CIPAA and:

G (a) in *Haji Wan Habib Syed Mahmud*, the Supreme Court affirmed the decision of the High Court which found that the delay of two months before the appellant sought relief was, in the circumstances of the case, unreasonable and unexplained. The relief sought was an interlocutory injunction, which the court said, being pre-eminently a discretionary H remedy, is exceptional in its nature and shall not be made available to those who sleep on their rights. In the instant case, the plaintiff has denied any delay on its part in filing the stay application and has offered its explanation as to why the stay application was filed on 10 February 2023. Furthermore, the passages from the judgment as cited by the I defendant do not discuss abuse of process; and

(b) in *Hisham bin Halim*, the High Court held that there was a blatant abuse of the court's process as the applicant had come to the civil court to injunct the Syariah Appeal Court from continuing with the proceeding without making any application to the Syariah Court for a stay of

proceeding. The passage relied on by the defendant merely sets out an example of an abuse of process which is trite ie 'where a suit is duplicated or where a party employs improper and perverse procedure to obtain an advantage undeservedly' whereas in the instant application, there is no duplicity or undeserved advantage emanating from the same.

[15] Even assuming there is delay by the defendant in filing the stay application, that alone cannot justify a dismissal of the stay application *in limine* as the CIPAA does not provide a timeline within which an application to stay an adjudication decision must be filed. Pursuant to O 69A r 4 of the RC 2012, such an application may be made to the High Court by way of an OS or a notice of application in the pending action to set aside the adjudication decision, and the applicant must show that an application under s 15 of the CIPAA has been made or the subject matter of the adjudication decision is pending determination by arbitration or the court.

Second issue: Whether there are clear and unequivocal errors in the AD?

[16] The plaintiff alleged that there are 14 errors in the AD as follows:

(a) despite the defendant's own admission that the design changes had taken place and varied the scope of the subcontract works, the adjudicator erroneously awarded the defendant based on the original sum or subcontract price as if no variation had taken place;

(b) the adjudicator erroneously deemed the plaintiff is not entitled to the adjustment or reduction of the subcontract price despite the substitution of heavy steel members with lighter ones which reduced the tonnage and saved costs;

(c) the adjudicator erroneously placed the burden on the plaintiff to provide evidence of the evaluation of the works;

(d) the adjudicator erroneously deemed that the plaintiff's claims for an adjustment to the subcontract price due to variations and/or design changes have been waived pursuant to article 2.3 of the supplemental agreement No 1 dated 5 November 2020 ('SA No 1') and therefore, waived by the plaintiff;

(e) the adjudicator erroneously found that article 2.3.2 of SA No 1 was not for the purpose of adjusting the subcontract price caused by design changes despite the fact that the saving provision of article 2.3.2 proves that the issues of variation and/or design changes have yet to be waived;

(f) the adjudicator erroneously found that it could not have been the parties' intention when they entered into SA No 1 that the entire

A subcontract agreement would be changed to a re-measurement contract when the plaintiff never took this position in the adjudication;

(g) the adjudicator erroneously deemed that value engineering does not amount to subcontract variation because the adjudicator had misconstrued provisions of the subcontract such as cl 13.1 of the Particular Conditions of Subcontract;

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(h) the adjudicator erroneously deemed that there is insufficient evidence to assess and conclude that the requirement for a valid subcontract variation has been complied with despite the fact the plaintiff had provided evidence of the same;

C

(i) the adjudicator erroneously deemed the subcontract works to have been substantially completed by the defendant despite the defendant's failure to notify the plaintiff of the completion of the works in accordance with cl 10.1 of the General Conditions of the Subcontract;

D

(j) the adjudicator erroneously deemed that the subcontract works to have been substantially completed by the defendant despite the fact that the defendant's claim was pursuant to cl 14.3 of the General Conditions of the Subcontract ie for an interim claim;

E

(k) the adjudicator erroneously deemed that the subcontract works to have been substantially completed by the defendant despite the defendant has not claimed for the first half of the retention monies pursuant to cl 14.7 of the Particular Conditions of the Subcontract;

F (l) the adjudicator erroneously deemed that the defendant had completed the Roof Floor and Crown installation works and the plaintiff was not entitled to withhold the sum of RM1.3m when in fact the plaintiff had issued numerous non-conformance reports to the defendant which shows that the subcontract works had not been completed;

G

(m) the adjudicator erroneously deemed that the plaintiff is not entitled to claim or deduct liquidated damages against the defendant unless the plaintiff had given notice of decision pursuant to cl 3.3 of the Subcontract; and

H (n) the adjudicator erroneously deemed that the defendant is entitled to a further extension of time to complete the subcontract works without determining the extent of the extension of time to which the defendant would be entitled. Further, the defendant failed to comply with cll 8.4 and 20.2 of the Subcontract.

I

[17] The defendant submitted that the purported errors are essentially a repetition of the grounds raised by the plaintiff in the setting aside application, and the 'errors' in sub-para 16(a), (b) and (g) above were even withdrawn by the plaintiff's solicitors during the hearing of the setting aside application on 13

February 2023. With regards to the 'error' in subpara 16(h) above, the adjudicator had decided in the plaintiff's favour.

[18] I have scrutinised the alleged errors and I agree with the defendant's contentions as aforesaid. As submitted by Mr James Monteiro, the scenario is akin to the earlier cases which were decided by this court, namely, *JEKS Engineering Sdn Bhd v PALI PTP Sdn Bhd and another case* [2022] 9 MLJ 541, *Zeta Letrik Sdn Bhd v JAKS Sdn Bhd and other cases* [2022] MLJU 2734 and *Meridian Contracts Sdn Bhd v Bauer (Malaysia) Sdn Bhd and another summons* [2020] MLJU 1405 where the court found that the applicants for a stay of the adjudication decision had put forth the same grounds as in the applications under s 15 of the CIPAA, which had been considered and determined to be unmeritorious.

[19] In the circumstances, the second issue is answered in the negative.

Third issue: Whether the defendant's financial position is such that it will be unable to repay the adjudicated sum to the plaintiff in the event the plaintiff succeeds in the arbitration proceedings

[20] The plaintiff relied mainly on the decision of the Court of Appeal in *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd and other appeals* [2023] 4 MLJ 720; [2023] 1 CLJ 1 (see in particular paras 53, 54, 59, 61 and 77) to support its arguments, among others, that there is lack of clarity in the defendant's true financial ability to pay back the adjudicated sum, if required and this amounts to a special circumstance that justifies a stay of the AD pending final determination of the dispute between the parties pursuant to the arbitration process (see too, paras 22, 26 and 30–33 of the judgment in *Pinnacle Supreme Sdn Bhd v DSG Projects Malaysia Sdn Bhd* [2021] MLJU 961; [2021] 1 LNS 852 which were quoted in the plaintiff's submission in reply).

[21] The defendant vehemently countered the plaintiff's arguments by insisting that it is an ongoing business concern and not one under financial distress for the reasons which were summarised as follows:

(a) there is no evidence that the defendant is unable to repay any debts;

(b) the defendant is not under any winding up or threatened winding up;

(c) the defendant has been suffering losses because of breaches by the plaintiff;

(d) the substantial portion of the defendant's liabilities are owed to Eversendai Corp Bhd ('ECB'; the defendant's holding company) and its other subsidiaries, and its directors, who are all supporting the defendant;

(e) despite being owed substantial amounts of money, the defendant was able to finance the works and had completed the project, except for a few drawings that are being submitted. The defendant pursued adjudication against the plaintiff only after substantially completing the works; and

(f) the plaintiff's expert, CT Lim, is not qualified and he did not deny that the defendant is a going concern.

[22] I have duly considered the affidavit evidence and the submissions of the parties and I find that the plaintiff has established the defendant's inability to repay the adjudicated sum to the plaintiff, if required to do so after the arbitration. My reasons are as follows:

(a) CT Lim's qualifications:

The defendant submitted that, based on CT Lim's curriculum vitae ('CV'; see exh 'LCT1', encl 41), he is an accountant and not a qualified or licensed auditor or liquidator. Thus, CT Lim does not have the requisite expertise and qualifications to comment or opine on auditing matters, liquidity, solvency and capital adequacy. Furthermore, as compared to the defendant's experts, Dawin Tang Keng Wai and Marilyn Ngu Siow Ping (see the *Expert Accountant Opinion on the Solvency of Eversendai Corporation Berhad* ('PKF Report') in exh 'NT-19', encl 39 at pp 283–286), CT Lim is not proverbially peritus, with skill or knowledge on the matters of audit and liquidity. Hence, the defendant urged the court to take caution when considering the PwC report and that its experts' findings and views are to be preferred over that of CT Lim.

Firstly, the issue as to CT Lim's qualifications as compared to the defendant's experts was not mentioned at all in the defendant's AIR (3) (encl 47). Therefore, there was no opportunity for CT Lim to respond to the statements which were made for the first time in the defendant's reply submissions.

Secondly, CT Lim has affirmed that he is a chartered accountant with more than 17 years of experience in performing statutory audits, management accounting and financial reporting functions, and providing independent valuation advice. Upon perusal of his CV, I am unable to agree with the defendant's contention as to CT Lim's purported lack of expertise and qualifications to carry out the task falling under the scope of instructions, namely, to provide an independent assessment of: (i) the financial health and financial soundness of the defendant; and (ii) the arguments and conclusions

raised in the PKF Report. I am satisfied that CT Lim has the requisite peculiar skills and knowledge in analysing the defendant's audited financial statements and the PKF Report to arrive at his findings and conclusions. In my opinion, CT Lim qualifies as an expert (see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232) and there is no justification for me to reject his evidence as being inadmissible or to give lesser weight to his report.

(b) ability to repay the adjudicated sum:

The defendant relied on para 26 in the judgment by Lim Chong Fong J (now JCA) in *Kayangan Kemas Sdn Bhd v Tmt Solutions Sdn Bhd* [2019] MLJU 1277 where His Lordship had explained regarding project cash flow and corporate cash flow and said, among others, that '… the continuing subsistence and survival of the construction company as an ongoing concern to undertake projects is dependent on corporate cash flow …' to support the submission that the defendant remains a going concern and is not a PN17 company with no evidence of inability to repay debts.

Based on the report prepared by CT Lim ('PwC report'):

(i) the expert had adopted the Capital Adequacy Test to indicate whether the defendant has sufficient assets to meet all its liabilities, and the Liquidity Test to indicate whether the defendant is able to pay its debts as and when they fall due.

With regards to the Capital Adequacy Test, CT Lim found that the defendant's net liability was deteriorating to a deficit of RM66,126,000 at the end of financial year 2022 ('FY22') and this indicates that the defendant does not have sufficient assets to meet its liabilities. The alarming decline from 2020 to 2022 where total liabilities exceeded total assets is '… a very strong indicator of the defendant's increasingly insufficient capacity to meet its financial obligations'.

As for the Liquidity Test, it '… reveals a significant worsening in the defendant's financial position from a net current liability of RM5,495,727 in FY18 to a net current liability of RM56,096,360 in FY21, highlighting an acute inability to fulfil short-term debt repayments'.

CT Lim goes on to say that 'Using the same tests applied by PKF in assessing solvency, it is evident that the defendant would have consistently failed the Capital Adequacy Test and the Liquidity Test in each of the past four financial years leading up to FY21';

(ii) apart from the two tests as above mentioned, CT Lim had conducted further analysis on the defendant's profit and loss statements and cash and bank balances for financial year-end 31 December 2017 to 31 December 2021 and found that:

(1) the defendant has consistently suffered net losses in each of the four financial years up to FY21, with a net loss of RM41,410,672 recorded in FY21;

(2) there is a pattern of consistent losses in escalating amounts from FY18 to FY21, resulting in the defendant having to rely on intercompany financial support. The defendant owes its related companies a net total of RM55,741,194 as at 31 December 2021, mainly from trade transactions and payments on behalf which are unsecured, interest-free and repayable on demand. Hence, these intercompany liabilities gives the lenders the right to request repayment of debt at any time without prior notice or a specific repayment schedule;

(3) any surplus cash available to the defendant by way of receipt of the adjudication sum may potentially be allocated towards repaying the intercompany liabilities;

(4) the defendant is heavily reliant on financial support from its immediate holding company to meet its obligations and carry on operations. Any failure on the part of the holding company to provide the necessary funds could have serious implications on the defendant's operations and its ability to fulfil its legal and contractual commitments.

(5) from FY17 to FY21, the defendant had an average year-end cash balance of RM1,434,811 over the past five years. By the end of FY21, the cash balance held by the defendant was RM210,563 which is insignificant when compared against the adjudication sum of RM25,457,990.03; and

(6) as an operating subsidiary, the defendant does not hold substantial cash balance at any one point in time. Instead, any surplus cash balances held by the defendant are either used to pay down external borrowings or intercompany liabilities based on observations on the accounts from FY17 to FY21.

The PwC report summarised that:

> 6.3.1. Based on Section 6.1 to Section 6 February 10 of this PwC report, it is evident that the defendant has been, and still is, facing severe solvency challenges. The Capital Adequacy Test reveals that the defendant has consistently been in a net liability position over the past five (5) financial years, indicating an inability to meet its financial obligations. Similarly, the Liquidity Test demonstrates a significant deterioration in the defendant's net current liability position, further highlighting its insufficient capacity to fulfil short-term repayments.
>
> 6.3.2. These solvency issues are exacerbated by the continued substantial losses incurred by the defendant and its reliance on intercompany financial support, leading to a substantial amount of intercompany liabilities owed to related parties. The fact that these liabilities are repayable on demand raises

> concerns about the allocation of any available cash towards repayment, potentially further compromising the defendant's financial stability. In light of these compelling facts, I believe that the defendant's is at high risk of being unable to repay the Adjudication Sum in the event the plaintiff prevails in the Arbitration.

In the light of the above excerpts from the PwC report, there is uncertainty over the defendant's ability to carry on as a going concern. In fact, in *Kayangan Kemas*, the court concluded that '… since there is only possibility but no cogent evidence of actual insolvency balanced with the need for corporate cash flow, I am of the view that the just approach in the circumstances is to order part payment of the adjudicated sum to TMTS with the balance of the other part of the adjudicated sum held in escrow pending the disposal of the Suit'. In the instant suit, I was inclined to make the order as I did because the plaintiff has proven, on a balance of probabilities, the precarious financial position of the defendant and it is not a certainty that the adjudicated sum will be re-paid to the plaintiff should the outcome of the arbitration be in the plaintiff's favor such that a conditional stay is appropriate in the circumstances of this case in the interest of justice.

(c) the defendant's financial position was never an issue?

Mr James Monteiro had submitted for the defendant that the plaintiff's arguments on the defendant's finances are afterthoughts because of the following reasons:

(i) the defendant's financial position was never previously a concern as the plaintiff had executed SA No 1 in 2020, which increased the subcontract price by RM36.293m, despite full knowledge of the defendant's financial position being largely the same as it is now. However, there is no expert evidence to show that the defendant's financial position is the same as at the time of the Subcontract Agreement in 2016. In any event, the PwC report shows significant worsening of the defendant's financial standing from 2018 to 2021;

(ii) the plaintiff is already holding ample monies or securities from the defendant in the form of the adjudicated sum, retention sums in the amount of RM17,13,549.92 and monies secured pursuant to a bank guarantee in the amount of RM32,849,223.61. I agree with the plaintiff that this factor has nothing to do with the defendant's ability to repay the adjudicated sum.

The fact is that the adjudicated sum is being held by the defendant's solicitors and will be released to the defendant if the stay application is dismissed. Meanwhile, the purpose of the retention sum is to ensure that the defendant attends to any defective works during the Defects

Notification Period. As for the bank guarantee, there is an injunction as a result of the injunction application and the matter is pending appeal (at the time of writing this judgment, the Court of Appeal has affirmed the decision of this court on 24 October 2023);

(iii) the plaintiff returned the defendant's Advance Payment Bond in the sum of RM17,710,997.48 in early 2022 even though there were advance/on-account payments that had not been recovered by the plaintiff at the material time. However, it is my considered view that this fact does not prove the defendant's ability to repay the adjudicated sum. The Advance Payment Bond was issued for the purpose of guaranteeing the return of the sum which was advanced to the defendant. Once that has been recouped, the Advance Payment Bond must be returned to the defendant (see para 36, encl 21);

(iv) the plaintiff had consistently under-certified payments, caused late issuance of payment certificates, made late payments and underpayment and sudden design changes in the name of 'value engineering'. However, this contention does not assist the defendant's case in establishing its ability to repay the adjudicated sum. Moreover, there is no expert evidence to show that the defendant's financial position is due to the plaintiff's failure in paying the adjudicated sum;

(v) the plaintiff or its affiliates had invited the defendant or its affiliates to tender for steelworks in the project and had awarded the same to the defendant; to tender for metal works in the project; to tender for projects in Qatar, Taiwan and Singapore; and to purchase steelworks for a Petronas project in Kuala Lumpur, all worth hundreds of Malaysian Ringgit (see paras 35–41 of the defendant's written submissions for the listing). Again, this does not show that the defendant will be able to repay the adjudicated sum to the plaintiff. In any event, the plaintiff explained that '... the invitation to the defendant to participate in the tender exercise was part of the competitive process. ... the defendant was invited to the tender exercise mostly because the defendant had already been present and mobilised on site-a fact the plaintiff believed at the time could give the defendant price advantage over other third party contractors, as there would be little to no preliminary and mobilisation costs ... the invitation to participate in the tenders do not in any way reflect the plaintiff's confidence in the defendant's financial position at any moment. (see para 34, encl 21).

(d) alleged attempt to infer the defendant's financial impecuniosity vis a vis ECB's financial statements:

The affirmations in the defendant's AIR (2) (encl 39) are mainly to rebut the plaintiff's allegation that there exists significant doubt on the ECB Group's and ECB's ability to continue as going concerns. In particular, it was averred, among others, that:

(i) the statement in ECB's Financial Statements is a qualified view formed by ECB's independent auditor, Messrs Baker Tilly Monteiro Heng PLT ('Baker Tilly') without the benefit of perusing documents on ECB's support from the financial institutions, ECB's restructuring plans and borrowings and ECB generating adequate cash flows for its operating activities. The statement is also a common and generic statement by independent auditors and not to be taken to mean that ECB is insolvent or not a going concern;

(ii) in the PKF Report, it was concluded that ECB and its individual companies are solvent and going concerns. ECB has sufficient assets to repay its liabilities, along with those of its subsidiaries including the adjudicated sum;

(iii) ECB is a going concern and not under liquidation or dire distress, which is why it is not classified as PN17 by Bursa Malaysia; and

(iv) ECB continues to receive funding and financial instruments from banks. ECB and its individual companies have been awarded large iconic projects worth approximately RM1.1 billion across India, Saudi Arabia, Qatar, Singapore and United Arab Emirates, which would not be the case if the companies are indeed in distress.

At the outset, it must be emphasised that the PKF Report centres on the solvency of the ECB Group ie ECB and its 19 subsidiaries, one of which is the defendant. The PKF Report did not consider the defendant's financial status and the key question on the defendant's ability to repay the adjudicated sum to the plaintiff. No rebuttal expert report to the PwC report was prepared and exhed although there was ample opportunity for the defendant to do so. In other words, the PwC report stands unopposed by the defendant.

I am mindful that the court may not reject unopposed expert evidence unless the evidence is obviously lacking in defensibility (see paras 34 and 35 in the judgment of the Court of Appeal *Majuikan Sdn Bhd v Barclays Bank Plc* [2015] 1 MLJ 171; [2014] 9 CLJ 337). In this case, the PwC report is not obviously indefensible. Therefore, the court not being an expert on financial matters in determining the financial health and financial soundness of the defendant for purposes of the stay application, should defer to expert opinion as found in the PwC report.

The plaintiff asserted that it has raised issues regarding the defendant's finances from the start and whatever evidence on ECB (see paras 3.10–3.30 and 7.1–7.7.1 of the PwC report on CT Lim's commentary on the PKF Report) is additional evidence to support the plaintiff's contention that the defendant is not able to repay the adjudicated sum. CT Lim had concluded in the PwC report that:

> 3.31. From my analysis above, the claims put forth by the defendant and its expert, PKF, are first and foremost irrelevant as they focus exclusively on the defendant's parent entity, ECB, instead of on the actual defendant itself, ECMSB.
>
> 3.32. If the same assessments had been done on the defendant as the relevant party, ECMSB would have clearly failed both the solvency tests put forth by its own expert PKF, and the financial evidence I have presented based on the audited financial statements of the defendant demonstrate that there is significant risk that it will not be able to repay the Adjudication Sum to the plaintiff should the plaintiff prevail in the Arbitration.
>
> 3.33. Even if one were to resort to relying on the financial strength of the parent entity of ECMSB, ie ECB, as a means to justify the ability of ECMSB to repay the adjudicated sum (which in any case is technically incorrect and conceptually unsupportable), there would still be a significant risk of the adjudicated sum not being recoverable by SUJV, based on ECB's own financial position.

In my view, the plaintiff had rebutted the defendant's averments as set out in subparas (i)–(iv) above whereby:

(1) in respect of subpara (i), in the Reports And Financial Statements for the Financial Year Ended 31 December 2022 dated 26 April 2023 ('2023 Report'), Baker Tilly had stated as follows:

> During the financial year ended 31 December 2022, the Group and the Company incurred net losses of RM366,861,000 and RM302,956,000 respectively, and as of that date, the Group's and the Company's current liabilities exceeded their current assets by RM168,333,000 and RM532,206,000 respectively. As disclosed in Note 28, the Group and the Company are in discussion with multiple financial institutions on restructuring plans for the Group's and the Company's borrowings.
>
> *These conditions indicate material uncertainties exist that may cast significant doubt on the Group's and the Company's ability to continue as going concerns.*
>
> The ability of the Group and the Company to operate as going concerns is dependent on:
>
> (i) the continuous support from the financial institutions and the discussion on restructuring plans for the Group's and the Company's borrowings be successfully concluded; and
>
> (ii) the Group and the Company to achieve Sustainable and profitable operations or through the disposal of non-core assets to Generate adequate

cash flows for their operating activities.

The defendant has not shown that it is able to meet the matters in (i) and (ii) as quoted above.

Further, Baker Tilly did not expressly state that they did not have the benefit of perusing documents in relation to the contingencies and the documents exhed in encl 39 pre-date the 2023 Report and should have been given or made available to Baker Tilly.

As for the allegation that Baker Tilly's statement is common and generic, the PwC report makes reference to the International Standard on Auditing 570 which '... requires the auditor to make adequate disclosures, under a separate section with a heading that includes reference to the fact that a material uncertainty related to going concern exists, to alert users to this circumstance as it is a matter deemed important to the users' understanding of the financial statements. It is important to note that a MUCG is only issued when events or conditions create significant doubt about a company's ability to continue its operations or meet its financial obligations, and/or the company may be unable to realise its assets and discharge its liabilities in the normal course of business'. Hence, the statements by Baker Tilly are not a 'blanket' cautionary statement nor are they a common occurrence;

(2) in respect of subparas (ii) and (iii), these were countered by paras 3.31–3.33 of the PwC report as quoted earlier (see too, paras 7.1.1–7.7.1 of the PwC report, especially paras 7 May 4 and 7 May 5). In para 7 July 1 of the PwC report, it was opined that 'Certain representations made by PKF in the PKF Report such as commenting on the success of ECB Group's debt restructuring exercise and ECB Group's potential to raise funds from the capital markets based on its status as a publicly listed company, are speculative in nature given no substantial evidence was provided to support the claims'; and

(3) in respect of subpara (iv), the loans and financing secured by other member companies of the ECB Group do not reflect the financial soundness of the defendant which is a separate entity from the other members of the Group and ECB, which are located outside Malaysia. The defendant did not exh any financial records of the other member companies of the ECB Group which have secured the facilities or the assets, and the collateral used to secure them.

As for ECB being awarded projects across numerous countries, all the documents on the projects as exhed were issued in 2022 except for one Subcontract Agreement dated 2 March 2023. These project documents should have been made available to Baker Tilly for the purposes of the 2023 Report. In any case, these documents do not prove that ECB and

its Group's finances are healthy and do not mean that the defendant is able to repay the adjudicated sum to the plaintiff.

(e) the defendant and ECB are allegedly financially sound:

The defendant submitted that the following behaviour of the markets, both domestically and abroad, towards itself and ECB do not support the various allegations made by the plaintiff and its expert:

(i) ECB's principal bankers have continued to work with, and support, ECB and its individual companies on a day-to-day basis which includes the issuance of performance bonds on behalf of ECB and its individual companies as well as the granting of loan facilities (sees paras 9 and 10 and exhs 'NT9' and 'NT10', encl 39 for the details). However, the performance bonds have nothing to do with the defendant and the exact circumstances revolving around the issuance of these bonds are unclear. With regards to the loans and financing secured by other member companies of the ECB Group, the defendant did not exh the financial records of these other member companies and the collateral used to secure the loans and financing. Anyway, this fact does not reflect the financial soundness of the defendant, which is separate entity; and

(ii) ECB's clients have seen no issue in providing bank guarantees to ECB's individual companies (see para 11 and exh 'NT11', encl 39). I am, however, inclined to agree with the plaintiff that the bank guarantee by BUCG (M) Sdn Bhd to another ECB subsidiary, Eversendai Engineering Sdn Bhd does not advance the defendant's case in any way.

The defendant additionally presented that ECB's *Interim Financial Report for the Financial Year Ending 31 December 2023 — First Quarter Ended 31 March 2023* has shown a profit of RM1.432m with assets exceeding liabilities (see para 16 and exh 'NT-14', encl 39). However, in para 7 March 1 of the PwC report, the expert opined that '... the translated profit of RM1,432,000 is insignificant when compared to the reclassified amount from the Syndicated Term Loan and Ijarah Facility to current liabilities outstanding (short term obligations) of RM707,06,000.

(f) the defendant allegedly financially backed:

According to the defendant, ECB as its holding company, is at all material times a going concern as confirmed in the PKF Report and will support the defendant. RM89,525,168 out of the total liabilities in the sum of RM131,812,870 as stated in the defendant's Financial Statements 2021 are sums owed to related companies, an immediate holding company and a director, all of whom will support the defendant. On this point, suffice to say

that the PwC report (see paras 3.33 and 6 February 4–6 February 10) casts doubt on the defendant's assertions on 'support' as it is unlikely the defendant will obtain financial assistance from ECB, and the substantial amounts owed to related companies, a holding company and a director is in fact indicative of the defendant not being in a position to repay the adjudicated sum.

[23] On a final note, the defendant's submissions pertaining to the plaintiff's financial health with reference to the plaintiff's Financial Statement 2022 which shows losses of RM84m, and on the issue of balance of convenience, are not relevant considerations for the stay application.

[24] The importance of upholding the intent of the CIPAA has been repeatedly emphasised in many cases on the CIPAA, two of which as cited by Mr James Monteiro are *Sime Darby Energy Solution Sdn Bhd (formerly known as Sime Darby Offshore Engineering Sdn Bhd) v RZH Setia Jaya Sdn Bhd* [2022] 1 MLJ 458 and *IRDK Venture Sdn Bhd v Econpile (M) Sdn Bhd and another appeal* [2020] MLJU 939. I have also alluded to the intention and objective of the CIPAA in the context of s 16 of the CIPAA in several judgments to date (see among others, *Syarikat TD Sdn Bhd v JEKS Engineering Sdn Bhd and another case* [2019] MLJU 1754 at para 129 and *MRCB Builders Sdn Bhd v Pembinaan Mitrajaya Sdn Bhd and another case* [2023] MLJU 52 at para 90).

[25] Nevertheless, in the final analysis of the present case, I am satisfied that the justice of the case warrants a stay of the AD pending final determination by way of arbitration as there is a real risk that the adjudicated sum, if released to the defendant, would not be able to be re-paid to the plaintiff in the event the plaintiff finally succeeds in the arbitration proceedings (see *CRCC Malaysia Bhd v M101 Entity Sdn Bhd and other cases* [2021] MLJU 1305 at paras 55 and 57; *Zeta Letrik* at paras 63 and 64; and *RA Suria Sdn Bhd v Cedy Third Contracting and Trading (M) Sdn Bhd and other cases* [2023] MLJU 247 at para 37 for the discussion on the meaning of 'justice of the case').

[26] In the premises, the third issue is answered in the affirmative.

CONCLUSION

[27] In view of largely the findings of the court in respect of the the third ssue above, the stay application in encl 1 was allowed with no order as to costs.

[28] I was of the further view that, in the circumstances of the case, a conditional stay is appropriate and hence, the adjudicated sum, which is currently held by the defendant's solicitors, shall continue to be so held in the stakeholder's account until the disposal of the arbitration proceedings.

A *Application allowed with no order as to cost.*

Reported by Ahmad Ismail

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